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1980

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## Recommended Citation

30 J. Legal Educ. 184 (1979-1980)

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# COMMENTS

## REWRITING FIRST-YEAR LEGAL WRITING PROGRAMS

MICHAEL BOTEIN \*

As the pages of this *Journal* vividly demonstrate, law teachers have been busily reforming curricula for decades.<sup>1</sup> Moreover, the first year of law school often has received special and separate attention.<sup>2</sup> Too many discussions have ignored any serious analysis, however, of methods for teaching students the vital lawyering skills of researching, synthesizing, and writing.<sup>3</sup> Aside from Professor Rombauer's 1973 study and the articles which it sparked,<sup>4</sup> there has been virtually no empirical work and very little discussion of the subject in the last two decades.<sup>5</sup> This shortfall is particularly anomalous in light of the fact that the most "prestigious" practice apparently demands these skills most.<sup>6</sup> Perhaps as a reflection of this, many upperclass students seem to want increased emphasis on writing skills during the first year.<sup>7</sup> A further analysis of the goals and methods for teaching these skills thus is in order.

Much of the difficulty with the traditional "legal writing" or "legal research" course simply lies in the name.<sup>8</sup> Neither its description nor its name

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<sup>1</sup> E. g., Gross, *On Rescuing the Three-Year Generalist Program*, 28 J.Leg.Ed. 249 (1977).

<sup>2</sup> McCulloch, *Curriculum Project*, 23 J.Leg.Ed. 528 (1971).

<sup>3</sup> This characterization of the relevant skills is obviously arbitrary and is merely a shorthand description of those attributes which enable a lawyer to perform the traditional tasks of preparing, discussing, or arguing complex legal and factual issues. For a more thorough analysis of potentially relevant skills, see the discussion of goals in text at n. 11 et. seq. *infra*.

<sup>4</sup> Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J.Leg. Ed. 538 (1973). See also, Lloyd, *A Student View of the Legal Research and Legal Bibliography Course at Utah and Elsewhere—A Proposed System*, 25 J.Leg.Ed. 553 (1973); Aaron, *Legal Writing at Utah—A Reaction to the Student View*, 25 J.Leg. Ed. 566 (1973); Gilmer, *Teaching Legal Research and Legal Writing in American Law Schools*, 25 J.Leg.Ed. 571 (1973); Dyer, *Whatever Happened to Legal Writing at Utah?*, 26 J.Leg.Ed. 338 (1974). For a more recent discussion of the topic, see B. Lammers, *Legislative Process and Drafting in U. S. Law Schools*, 9 et. seq. (1977).

<sup>5</sup> Indeed, concern with legal writing very well may have the cyclical nature which Professor Rombauer ascribes to it. Rombauer, *supra* n. 4 at 539-542.

<sup>6</sup> Laumann & Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1 Amer.B.Foundation Res.J. 155, 177-182 (1977).

<sup>7</sup> Lloyd, *supra* n. 4 at 558-559.

<sup>8</sup> E. g., Dyer, *supra* n. 4 at 339.

usually gives any real clue as to the course's goals and techniques. Indeed, this very ambiguity invites superficial analysis of the problems in teaching researching, synthesizing, and writing. It thus is altogether too easy to implement symptom-oriented changes rather than to define desirable goals and available tools. Moreover, legal education faces a future with declining enrollments and revenues; law schools thus literally cannot afford to disregard questions of efficiency in designing legal writing programs.

### 1. *Some Potential Goals*

Law teachers are notoriously lazy in defining their educational goals.<sup>9</sup> Moreover, this phenomenon is aggravated with respect to legal writing, since the course has no substantive content. For example, most law teachers would agree that a course in Property should deal with legal relations between people and personal and/or real property. Even this minimal consensus does not exist as to legal writing, since the course conceivably could cover anything from fundamental composition to oral advocacy—and in any substantive context. Crossing this semantic swamp thus is a necessary first step in making any meaningful observations.

The first task is to identify a writing program's potential goals. To be sure, an almost infinite variety exist; nevertheless, articulation of some common—albeit alternative—goals should suggest the nature and breadth of the continuum.

One possible goal might be insuring merely that all law graduates had basic English composition skills. A second possible goal might be training students in formalistic aspects of writing legal documents—i. e., citation form, proper use of jargon, etc. Third, a program might attempt to teach students to manipulate legal research materials. Another goal might be to familiarize students with basic legal documents such as pleadings, instruments, and the like. A fifth and final goal might be training a student to analyze and handle a problem either as a counsellor or an advocate.

This inquiry naturally goes to the essential skill of "lawyering." To be sure, no one can—and few even try to—define this.<sup>10</sup> Nevertheless, a rather general consensus probably exists simply in terms of a graduate's ability to produce material which most of the profession would find at least competent—almost a notion of merchantability.<sup>11</sup> (Presumably law schools do not and should not warrant their graduates' fitness for any particular use.)

Judgments as to the validity of any or all of these goals obviously are highly normative. Nevertheless, it is possible to articulate each goal's most significant aspects.

Teaching English composition to graduate students seems patently ridiculous on its face; after all, this nation's much-vaunted system of free public education should be able to produce reasonably literate high school graduates. College graduates' general level of writing ability, however, has declined

<sup>9</sup> E. g., Reich, *Toward the Humanistic Study of Law*, 75 Yale L.J. 1402, 1408-05 (1965).

<sup>10</sup> E. g., Weihofen, *Education for Law Teachers*, 43 Colum.L.Rev. 423, 429-39 (1943).

<sup>11</sup> To a very limited extent, the emergence of both the multi-state bar examination and an increasingly pervasive federal practice should help to create some consensus, at least by reducing somewhat the impact of geographical diversity.

steadily for the last decade.<sup>12</sup> A substantial number of law teachers apparently recognize this problem; most place total accountability on undergraduate education, however and see little role for legal education.<sup>13</sup> But although remedial education should not be a responsibility of professional schools,<sup>14</sup> it simply cannot be ignored. A law graduate's inability to write competently—let alone articulately—obviously has a major impact upon his or her success. And a graduate's deficiencies are detrimental to a law school's interests; the consistent production of second-rate or at least unsophisticated graduates does not enhance a law school's image. Although no faculty ever has a consensus as to an appropriate image for its school, few teachers presumably are anxious to have a reputation for producing inarticulate graduates.

Training students in legal jargon and citation form also seems like a rather lowly task for a professional school. Nevertheless, students legitimately cannot be expected to learn these skills in their usual coursework, and the White Book is not exactly an ideal vehicle for self-directed learning.<sup>15</sup> Although misuse of legal jargon or mis-citation of legal authority is not as embarrassing as a fundamental inability to write or speak, weakness in these very basic skills does not make a very favorable impression on the profession. Just as a law school must care about its graduates' literacy, it has a stake in their formalistic skills.

A graduate also must be able to manipulate research tools, simply to find relevant materials. And as with more formalistic skills, a certain amount of structured training is necessary to insure that students acquire these skills.<sup>16</sup> Inability to find relevant materials is obviously disastrous to a graduate—and thus, once again, to a law school's reputation.

By the same token, a law school arguably should insure that its graduates can manipulate basic legal documents, forms, et cetera. Nevertheless, a law school has no duty to have such training. The legal profession correctly assumes that bright new attorneys know few practical details, but can learn them quickly.<sup>17</sup> Since most law graduates today are comparatively high-quality, they can learn to manipulate basic documents quickly enough to avoid embarrassment.<sup>18</sup> Moreover, achievement of the other goals should insure

<sup>12</sup> New York Times, Feb. 23, 1977, § B, at 6, col. 1. This phenomenon is hardly new, however, since the 1930's witnessed a similar movement away from teaching basic writing skills in college education. Rombauer, *supra* n. 4 at 540.

<sup>13</sup> Lammers, *supra* n. 4 at 8-9. On the other hand, Professor Rombauer found that law teachers thought teaching writing was the second most important goal in their courses. Rombauer, *supra* n. 4 at 550.

<sup>14</sup> E. g., Aaron, *supra* n. 4 at 567.

<sup>15</sup> E. g., Gilmer, *supra* n. 4 at 574-575. See also discussion of methods of teaching formalistic skills in text at n. 48.

<sup>16</sup> See discussion of methods of teaching legal research techniques in text at n. 48.

<sup>17</sup> Association of American Law Schools, *Training for the Public Professions of the Law: 1971 18-19* (1971).

<sup>18</sup> Graduates will not receive this type of on-the-job training, however, if they elect to begin their careers as solo practitioners—e. g., in situations such as the Philadelphia Neighborhood Law Office program. B. Christensen, *Lawyers for People of Moderate Means* 208-209 (1970).

that students are capable of learning the practical ropes quickly and efficiently. And some clinical enterprises, of course, offer excellent training in these areas.<sup>19</sup> Accordingly, a law school need feel no compelling pressure to fulfill this goal on a large-scale basis.

On the other hand, teaching legal analysis is a law school's prime responsibility. To the extent that any consensus about "lawyering" exists, it indicates that a law school has a mandate to teach these skills. To be sure, conventional classes do—and must do—this job to a very large extent. But they cannot shoulder the whole load. In most courses, a teacher can spend only a very limited amount of time in developing each student's analytical skills, either inside or outside the classroom. And even if teachers had more time, conventional courses need to cover so much material that a teacher could not focus on a student's treatment of a narrow area—which, of course, is precisely the job of lawyers. Examinations are of little utility, because of the time pressures on the student to write them and the teacher to correct them. Although examinations may measure a student's mastery of a subject, they do not create any significant teacher-student interaction. Requiring a student to produce a detailed analysis of a comparatively narrow topic, however, greatly increases not only the rigor of a student's analysis, but also interaction between teacher and student.<sup>20</sup> A student has the time and the responsibility to think a problem through; a teacher has the time to make specific criticisms; and a student can reflect upon his or her deficiencies in detail. To a certain extent, of course, seminars already may fulfill this goal; pragmatically, however, only a few students take a large number of seminars.

This final goal thus is by far the most important for the student, since it enhances his or her ability to perform complex tasks in a professional manner. And once again a law school has a very real stake in achieving this goal; to the extent that its graduates take on the profession's most intellectually difficult and demanding tasks, a law school presumably benefits.

## 2. *Some Available Techniques*

The first, second, third and fifth goals thus demand serious consideration. As noted before, however, law schools all too often create bigger and better programs,<sup>21</sup> rather than analyzing educational needs and tools. Instead of this bandaid approach, it thus may be useful to analyze specific means for reaching specific goals.

Using faculty to teach basic English composition is a waste of limited resources.<sup>22</sup> Instead, a law school can achieve the same or perhaps even better results by using professional writing teachers—e. g., graduate students with sufficient training, high school teachers, and the like. Indeed, judges have subjected themselves to critiques by college-level English professors and apparently benefited from the process;<sup>23</sup> presumably students should fare at

<sup>19</sup> This situation naturally does not pertain as to comparatively specialized skills, such as legal drafting where Professor Lammers has found a significant lack of training. Lammers, *supra* n. 4 at 12–15.

<sup>20</sup> Gilmer, *supra* n. 4 at 573–574.

<sup>21</sup> See discussion in text at nn. 1–6, *supra*.

<sup>22</sup> Moreover, it very well may be faulty to assume that law teachers either know or can teach English composition. E. g., Dyer, *supra* n. 4 at 339.

<sup>23</sup> Lammers, *supra* n. 4 at 42, n. 55.

least as well. As noted later,<sup>24</sup> use of specialized personnel can result in significant fiscal and psychic savings for a law school.

Similarly, faculty need not teach basic citation form and legal jargon. Since many students master these comparatively simple skills by their second or third year, qualified upperclass students certainly can handle these tasks at a comparatively low cost.

Teaching legal research poses more difficult problems. Although faculty supervision appears to be necessary in some form, commitment of substantial teaching personnel is neither essential or perhaps even advisable.<sup>25</sup> Personal experience, informal discussions with students, and class evaluations indicate that students learn quite effectively by suffering through "finding exercises" with minimal faculty input. To be sure, teachers must draft or oversee the drafting of these exercises.<sup>26</sup> But they need not administer or correct them.<sup>27</sup>

On the other hand, faculty input is necessary—but worthwhile—in teaching legal analysis. A writing assignment allows closer and more detailed interaction between teacher and student than is possible in even a comparatively small class. To be sure, some students will develop these skills through class-work, law review, other publications and various extracurricular activities. But most law schools at present simply do not provide enough relevant activities to guarantee participation for every interested student. Some schools offer comparatively few extra-curricular writing activities; for example, Professor Lammers found a range among schools of between three and thirty-three percent of students writing for law review or other publications.<sup>28</sup> Moreover, many students simply have no interest in these activities. Indeed, the same students often participate simultaneously in several activities—e. g., law review, moot court, etc. Some form of "basic training" thus is essential for all students.<sup>29</sup>

### 3. *Some Common Models*

Different techniques are most appropriate for meeting different goals. The problem lies in devising the best mix of techniques. Before considering the options, however, it may be fruitful to review the most common types of programs, their values, and their costs.

There are many models, although no definitive catalogue of them seems to exist.<sup>30</sup> To a certain extent this belies the decreasingly heterogeneous nature

<sup>24</sup> See discussion at n. 48, *infra*.

<sup>25</sup> *Id.*

<sup>26</sup> Most of the pre-packaged exercises from West or other publishers frankly are either too self-serving or too arcane for a teacher's particular set of goals; accordingly, a teacher usually must hand-tailor exercises to his or her class's particular needs at least partially.

<sup>27</sup> In both informal discussions and class evaluations, students consistently indicate that while lectures and class meetings have limited utility, books and other materials are useless. See also Dyer, *supra* n. 4 at 338.

<sup>28</sup> Lammers, *supra* n. 4 at 12.

<sup>29</sup> Moreover, some students will receive only this very basic instruction, if they either deliberately or unconsciously avoid taking other courses which require use of these skills.

<sup>30</sup> Cf. the survey results in Lammers, *supra* n. 4 at 9, with those in Rombauer, *supra* n. 4 at 543-544. To a certain extent, the disparities probably result from

of law schools—i. e., national, regional, local, etc.<sup>31</sup> At the same time, this variety may result from the previously discussed ambiguity in both goals and techniques.

The most expensive model, of course, gives a full-time teacher responsibility for all relevant goals.<sup>32</sup> To be sure, this probably brings the greatest amount of talent to bear on each student. But this model's cost is usually prohibitive. If one teacher with half of his or her time can serve even thirty students—a highly optimistic estimate<sup>33</sup>—a law school's cost ranges between \$1,000 and \$2,000 per student annually, depending on the teacher's rank, et cetera.<sup>34</sup> Moreover, the cost/benefit relation appears to be nebulous at best, although students seem to favor close faculty supervision.<sup>35</sup> After all, law students and others can perform many tasks as effectively as and much less expensively than full-time faculty.

A somewhat different and less expensive model, of course, is the associate-in-law program.<sup>36</sup> This model normally uses recent graduates at annual salaries of \$8,000 to \$11,000—\$13,000 to \$16,000, if lost tuition and fringe benefits are included.<sup>37</sup> Since associates-in-law commonly work almost full-time on writing programs, they can serve between fifty and seventy-five students effectively. A law school's cost under this model thus ranges between \$300 and \$500 per student annually—amounts which are not inconsiderable, but which are considerably lower than under the full-time faculty model.

The theory behind the associate-in-law model naturally is using new and comparatively inexpensive talent to free faculty time. To be sure, the associates are quite capable of correcting composition, jargon, and citation errors; and they usually have enough analytic ability to handle most problems.

different respondents' views of their programs, to a certain extent, merely from the constant changes in the structure of writing programs.

<sup>31</sup> E. g., C. Kelso, *The AALS Study of Part-Time Legal Education: Final Report* 316 et seq. (1972).

<sup>32</sup> Both Professors Rombauer and Lammers indicate that comparatively few schools—i. e., less than a quarter—use this approach. *Supra* n. 30.

<sup>33</sup> The usual ratio in a clinical program is twenty students per teacher or less. Del Swords, *Including Clinical Education in the Law School Budget* 309, 340, in CLEPR, *Clinical Education for the Law Student* (1973). Accord, Rombauer, *supra* n. 4 at 547-548.

<sup>34</sup> These figures include the cost of fringe benefits and supporting services. *Id.* at 315 et seq. In theory, costs of teaching and other materials might remain constant from one model to another. Realistically, however, it seems only reasonable to posit that increased faculty/teaching assistant involvement will generate more exercises—and thus increased costs for both materials and supporting services.

<sup>35</sup> Lloyd, *supra* n. 4 at 564.

<sup>36</sup> Professor Rombauer found less than a fifth of her sample using "short term instructors." Rombauer, *supra* n. 4 at 543.

<sup>37</sup> One variation on this theme is to use adjunct professors at comparatively low salaries on a part-time basis. Rombauer, *supra* n. 4 at 543. Assuming that a typical adjunct professor will devote at most ten hours a week to teaching at a cost of roughly \$2,000 per semester, three adjuncts would cost about the same as one associate-in-law and probably invest less time—thus making any real savings illusory. Very pragmatically, however, heavy use of adjuncts obviously inflates the absolute number of teachers in a writing program—an illusion which some schools may wish to cultivate.

But precisely because associates have not taught before, their pedagogical insight may be somewhat limited; accordingly their drafting and correcting of problems is sometimes less than outstanding. To be sure, faculty supervision can help cure this problem. But intensive faculty participation defeats the main purpose of the program. The results of associate-in-law program thus are often less than satisfactory.

A third model combines some features of the first two models, by involving a faculty member and a student teaching assistant.<sup>38</sup> If a full-time law teacher allocates one-fourth of his or her time to a thirty-student writing program, a law school's cost is \$500 to \$1,000 per student annually—plus his or her teaching assistant's cost of \$40 per student.<sup>39</sup> In theory, this model should combine the best features of student and faculty resources. After all, a top-notch teaching assistant presumably can correct all composition, jargon, and citation errors, thus leaving a teacher free to focus on analysis. But even more than associates-in-law, teaching assistants naturally have somewhat limited analytical ability and pedagogical insight. Although they provide invaluable assistance in drafting problems and correcting some errors, the main burden of handling students' analytical problems still falls on a faculty member. To the extent that faculty members are willing to assume substantial responsibilities, this model can be highly effective. But unless teachers receive sufficient recognition, the result is either inadequate performance by or inequitable burdens on faculty members. This model thus ameliorates the cost problems in the full-time faculty model only to a limited extent.

A fourth model reverses these priorities, by giving all teaching responsibility to upper-class students—often a school's moot court or similar organization—subject to very limited oversight by one or two faculty members. A law school may not even need to pay the upper-class students, who may work for perceived prestige.<sup>40</sup> In this case, the cost is obviously quite low—i. e., one course enterprise for one teacher, or five to ten thousand dollars depending upon rank. But the quality also is naturally quite low. The basic problem is the distance between the supervising teacher and the first-year students, since the upper-class students may be weak in formalistic skills, research ability, and analytical competence. To a very real extent, this approach thus represents the nearsighted leading the blind. It is a cheap approach with cheap results.

The fifth, stripped-down, economy model is a totally student-run operation. This approach attempts to recreate law review training on a school-wide basis. To be sure, it has a very sound cost rationale; a law school bears only the inevitable but low expenses of typing, reproduction, etc. Naturally enough, this model also is weakest in pedagogical terms. Unless they have sufficient financial status or credit incentives, high-quality upper-class students may not be attracted. The students' ability to correct formalistic errors thus may be questionable, their analytical competence quite poor. With no significant faculty supervision, this model lacks any real educational insight or planning.

<sup>38</sup> Again, Professor Rombauer found about a fifth of her sample using this approach. Rombauer, *supra* n. 4 at 543.

<sup>39</sup> This assumes that a teaching assistant will spend ten hours annually with each student at a nominal cost of \$4.00 per hour.

<sup>40</sup> E. g., Germain, *Legal Writing and Moot Court at Almost No Cost: The Kentucky Experience 1971-72*, 25 J.Leg.Ed. 595 (1973).



These five basic models—and their various permutations—naturally come with a number of optional accessories, such as status as separate courses, ties with substantive courses, amount of credit, and number of semesters. Accordingly, it may be fruitful to examine some of the options.

As previously noted, the most common practice is to pursue all relevant educational goals in a separate course. This approach, however, creates some very real problems. A separate course usually carries fewer credits than conventional offerings, and thus seems less significant to students. Commitment to the course inevitably suffers. Students often feel that the work is not worth the credit, that the course is “mickey mouse,” and that the teacher must be inferior to teaching the course in the first place—an attitude which rubs off on teachers too.<sup>41</sup> This separate and unequal status also complicates any attempt to tie writing projects in with conventional courses, since a teacher cannot keep track of other courses’ coverage on a day-to-day basis—particularly in a multi-track system. The best approach thus appears to be tying a writing program onto one or more major courses.

Another significant question, of course, concerns the amount of credit which a writing program should carry. The ancient practice of allocating no credit seems counter-productive. If writing assignments are not part of a conventional course, lack of credit obviously compounds the problems noted above. If a writing program is part of a substantive course, however, failure to give separate credit creates other very real problems. First, it penalizes students who invest large amounts of time in writing projects. To be sure, inclusion of writing program grades in the final course grade ameliorates this problem to a certain extent; but it then detracts from the importance of the course material. Similarly, lack of credit reduces the amount of class time for substantive issues; a conscientious teacher or student inevitably uses class time to discuss writing projects.

If credit is due, the next and more difficult issue is fixing the proper amount. As with any law school offering, this decision obviously depends upon highly normative judgments. “Double-entry book juggling”<sup>42</sup> to give only token credit is inappropriate and counter-productive. It is possible to work out some rough figures, however, by comparison to present credit allocation schemes. In this context, an example may be useful. An effective writing program arguably might consist of the following admittedly arbitrary exercises and amounts of student time:<sup>43</sup>

- Simple library “finding” exercises, to acquaint students with the nature and location of major research tools 10 hours
- Short (i. e., five pages) memorandum of law, to introduce research and analytical techniques 15 hours<sup>44</sup>

<sup>41</sup> Rombauer, *supra* n. 4 at 550.

<sup>42</sup> Aaron, *supra* n. 4 at 570.

<sup>43</sup> Obviously enough, the necessary amount of time will vary with each student simply because each has different capacities and background. This need not cause any great concern, however, for two reasons. First, experience indicates that most students’ abilities cluster around a norm. Second, and perhaps more important, students obviously bring different abilities to the other courses in which they compete. Laftman, *Study Habits and Their Effectiveness*, 27 J.Leg.Ed. 418 (1975).

<sup>44</sup> In a critique of a prior draft of this article, Professor Lammers argues that fifteen hours is insufficient time for an appropriate drafting exercise. Lammers,

• Long (i. e., ten to fifteen pages) memorandum of law, to develop independent research and analytical skills in more depth	25 hours
• Drafting exercise, e. g., will, trust, statute, etc.	15 hours
• Brief and oral argumentation.	50 hours
TOTAL	115 hours

These figures give at least a rough estimate as to the necessary amount of credit. Conventional wisdom assumes that students should invest three hours outside of class for every hour in class. In a fifteen-week semester one credit thus represents at least forty-five hours of class preparation and five hours of final exam preparation. On this basis, the above program should have at least two credits. Obviously enough, different requirements should carry different amounts of credit. And some slippage obviously exists in these calculations, since they cannot estimate the amount of exam preparation time allocable to each credit of typical substantive work.

These considerations in turn impact upon a program's amount and location of semesters. Lumping a major program into one semester seems unwise. One semester's limited duration simply does not allow students to receive and reflect upon critiques; at best, a student will receive corrections on a prior exercise a few days before beginning a final draft of a new project. This negates much of a program's educational value, since students cannot build upon their prior work—and, most importantly, their prior mistakes.

An appropriate location for a two-semester program, however, is difficult to pinpoint. In many ways, the first semester is an inappropriate time to begin. It generally is the most difficult semester in terms of both pedagogical and psychological burdens.<sup>45</sup> More important, most first-semester students do not even begin to develop analytical skills in their conventional courses until the second or third month.

On the other hand, a program which begins during the first semester terminates by the end of the first year—thus preparing student for second-year courses which require writing and related skills. The second semester is probably a more educationally appropriate time to begin a program, however, since by then students have acquired significant analytical ability in their first-semester courses. If a program begins in the second semester, a law school must move back any third-semester courses which require the program's skills—a process which should not be unduly difficult. And as noted shortly,<sup>46</sup> a curriculum should provide—and perhaps even require—a legal writing component during the second and third years.

#### 4. *Some Options*

Having reviewed a program's possible goals, the present methods' general failure to achieve them, and the relevant techniques, it is appropriate to explore the alternatives.

*supra* n. 4 at 43. Although it clearly would be impossible to teach drafting skills in depth within these time constraints, the author's experience indicates that this is sufficient exposure at least to give students a general "feel" for problems in drafting.

<sup>45</sup> E. g., Reich, *supra* n. 9.

<sup>46</sup> See discussion in text at n. 47 *infra*.

The first and most obvious option simply is to offer no program at all, on the theory that a student has a personal responsibility to insure that he or she becomes adequately educated in these respects. And surprisingly enough, a substantial number of schools seem to choose precisely this option.<sup>47</sup> To be sure, many students will develop the necessary skills on their own. To the extent that they are available, seminars and extracurricular activities service at least some students. Indeed, a law school arguably could offer no program and instead use those resources to field enough new courses and extracurricular activities to serve more students. This approach would be much more credible, of course, if a law school also required all students to participate in a minimum number of appropriate courses or extracurricular activities. Although this proposition raises curriculum-wide issues beyond the scope of this article, it seems valid in light of the astonishing speed with which people lose new but unexercised skills.<sup>48</sup> In fact, a law school could give students options—e. g., service on a publication, a certain number of designated courses, etc. The obvious fly in this ointment, of course, is its assumption that students will learn even very basic research and formalistic skills on their own before plunging into courses or extracurricular activities. But as the later discussion suggests,<sup>49</sup> students may be able to acquire these skills without a monolithic program.

A second option would be to use one of the five models outlined above or a hybrid thereof. Since none of these appears to be terribly satisfactory, however, there seems little reason to embrace any. Perversely enough, the totally student-run model may be most attractive; it achieves at least a few educational goals and costs virtually nothing.

A third and final alternative would be for each school to create its own model, by using specialized instructional techniques to achieve its particular educational goals. Instead of establishing a monolithic structure, this approach would use different methods and programs to achieve different goals. To be sure, an infinite variety of approaches is possible. Nevertheless, an example may focus thought and discussion usefully.

Probably the most efficient means of achieving the first goal—namely, effective English composition—is to use nonlegal professional writing teachers. To be sure, there may be some minor difficulty in insuring their competence; too many graduate English students today apparently sacrifice writing for flair. Appropriate screening procedures, however, are feasible. For example, some undergraduate schools use writing “preceptors,” whom they screen rigorously by both interviews and sample work. In light of the extremely poor market situation for humanities graduate students, they probably would be most interested in expanding their activities to law schools. In addition, most areas appear to have a plethora of present or former high school English teachers who are anxious to tutor. To be sure, use of personnel from outside a law school definitely might create disgruntlement among law students, who might view these payments as lost income, and among law teachers, who might see this as unprofessional. But even if a professional writing

<sup>47</sup> Lammers, *supra* n. 4 at 9 reports 22 respondents with no required course in legal writing.

<sup>48</sup> Underwood, *Attributes of Memory*, 76 *Psychological Rev.* 559 (1969).

<sup>49</sup> See discussion in text at n. 50, *infra*.

instructor spent two hours apiece on three major papers with each student, the annual cost would be \$30 to \$60 per student. Moreover, there are several ways to reduce even those low costs. First participation could be voluntary. The obvious problem with this approach is that students with the greatest need might not take advantage of the instruction. Second, a faculty member might have discretion to require students to take writing instruction. The major problem with this option is that it invites some rather ugly disputes. A middle ground might be requiring each student to submit one or two papers, with further participation on a voluntary basis.

Top-flight third year students can fulfill the second and third goals—i. e., proper use of legal jargon, citation forms, and research tools. Many students with experience on publications or with intensive seminars can perform these substantially mechanical tasks quite well. Moreover, a small degree of error is tolerable in these areas, since few law review editors come close to perfect White Book form. Although these third year students must be reasonably competent, they need not fit the mold of the traditional teaching assistant. If a third year student spent two hours on each of three major papers, the total cost would be \$30.00 per student annually. And as with the previously-discussed professional writing teachers, there are several ways to decrease even this low cost.

Only teachers and the very best third-year students, however, can fulfill the third goal of teaching legal analysis. But if writing instructors and third-year students have corrected all other errors, the teacher's and teaching assistant's jobs would be comparatively easy. The teaching assistant would draft problems and check for gross analytical mistakes; the teacher would supervise the drafting of problems and double-check the teaching assistant's substantive comments.

If a teacher spent one hour on each of three papers—a liberal estimate—the annual cost would be \$50.00 to \$100.00 per student depending on rank; if a teaching assistant spent two hours on each of three papers, the cost would be \$30.00 per student annually.

The total costs of this alternative, exclusive of materials, thus break out as follows on a per student basis:<sup>50</sup>

• Professional Writing Instructors	\$ 60.00
• Third Year Students	60.00
• Faculty	100.00
TOTAL	<hr/> \$220.00

On the one hand, this alternative is less expensive than any of the models which make meaningful use of teachers or teaching assistants.<sup>51</sup> On the other, it brings substantial talent to bear on each student's work. Naturally enough, other formulations can provide vastly different services at widely varying costs.

<sup>50</sup> These estimates use the highest—and thus most conservative—figures.

<sup>51</sup> See discussion in text at n. 33 et seq., *supra*.

The main advantage of this alternative is that it lifts all menial chores from the faculty.<sup>52</sup> One teaching credit per semester thus might be just compensation for faculty members; indeed, to the extent that the faculty workload were less than one credit, this approach actually might attract faculty participation. This alternative's main disadvantage is that it would require a faculty member to supervise several law students and writing teachers. This problem of coordination is not as severe, however, as it might appear. The educational goals are comparatively discrete; accordingly, there is no substantial need for coordination between writing instructors and teaching assistants. Moreover, a teacher would have a very effective check on all personnel, since he or she would see the results of their work on final review of papers. Although periodic meetings between a teacher and other personnel would be useful, close supervision would not be necessary.

To be sure, this example is hardly a prescription for all or even any law schools. Nevertheless, it at least demonstrates the value of abandoning monolithic planning and instead structuring a program to meet specific educational goals.

### CONCLUSION

This discussion thus ends with basically the same moral as it began: law schools must identify their particular needs and techniques in a legal writing program, rather than just plugging in existing models. The first task thus is to reach a consensus—or, more realistically, a compromise—as to appropriate goals. This process not only allows a school to select fine-honed teaching tools, but also exposes hidden costs. The next step is to choose narrowly defined educational methods to achieve these goals, perhaps resulting in the hybrid type of program hypothesized above. To be sure, this painstaking analysis of goals and methods is time-consuming, difficult, and frustrating. But it can result in better performance—perhaps at a significantly lower cost—than simply penciling in a writing program as an afterthought.

<sup>52</sup> To be sure, some teachers may not want to give up these chores; Professor Lammers is quite correct in pointing out that empirical research on this point is lacking. Lammers, *supra* n. 4 at 43. Most teachers appear to dislike this type of work, however, and to be anxious to be rid of it. Rombauer, *supra* n. 4 at 546-547.